Unhealthy Plans

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▶On the first day of the new session of the NY State Legislature, the Senate Insurance and Health committees held a joint forum on the failure of Health Republic Insurance Company of New York, the largest of the non-profit health insurance exchanges created under the Affordable Care Act. State regulators shut down Health Republic last November, leaving its 200,000-plus insureds scrambling to transfer coverage and health providers uncertain about being reimbursed for their services. In addition to the immediate problems resulting from Health Republic's shutdown, the Senate forum stoked a broad discussion about the causes of the failure, how it could have been prevented, and how best to respond to the resulting chaos and uncertainty among the various interest groups.

The panel of invitation-only participants included representatives of national and local health plans, doctors, hospitals and other health providers, plus a representative from each of the state departments of Health and Financial Services (Insurance Division). The almost two-hour discussion centered primarily on three major themes: adequacy of rates, including the existing prior approval system; adequacy of oversight; and a safety net for the payment of claims against failed health plans.

The rate adequacy discussion was fascinating, demonstrating again that actuarial analysis remains more art that science. The competing health plans and their trade representatives argued that the signs of trouble were or should have been apparent to regulators before they approved rates at least 30% below the rest of the market. The regulators in turn observed that, yes, reasonable actuarial analysis can result in a 30% or more discrepancy between similar health plans of different providers. In the face of such reasonable conclusions, they had no choice but to approve the rates. The resulting regulatory approval of rates that in hindsight were significantly inadequate bolstered health plan criticism of the whole prior approval process and its perceived lack of transparency and oversight. This dialogue, which is far from a new conversation, underscored the ongoing tension between plan managers and regulators, again exposing the inherent conflict of regulators seeking the lowest possible rates for consumers while also ensuring the adequacy of rates to maintain solvency. While the debate is fascinating and the issues real, legislative action addressing the complex regulatory rate process and the underlying age-old conflict of rate suppression versus solvency is far from assured.

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The same may also prove true regarding the third major topic of the hearing: the lack of any guaranty fund or safety net coverage for claims against failed health plans.

In yet another quirk in its long list of 49 versus one, New York is the only state with no guaranty fund coverage for claims against failed health plans. New York has guaranty funds covering claims against failed property/casualty, auto, workers' compensation and life insurance companies (their adequacy and fairness is another issue), but not for health insurance policies unless issued by a NY licensed life insurer – which does not include Health Republic or most other health plans. As a result, any hope of reimbursement in full of Health Republic's more than $200 million outstanding unpaid fees and expenses will depend on the regulators' ability to marshal assets and the largesse of the Legislature and the Administration.

Although forum participants acknowledged that New York is the only state without a safety net for claims against failed health plans, support for the need for formalizing a guaranty fund mechanism was far from universal. While health providers generally bemoaned the lack of any safety net for the reimbursement of their fees and expenses, a number of the plan representatives argued that the cost of any safety net would add yet another excessive burden on providers already overwhelmed by taxes, assessments and unreasonable political and market pressures.

The criticism that most caught my attention, however, was voiced by the CEO of the New York Health Plan Association, Paul Macielak, who exclaimed that a guaranty fund is "almost like a get out of jail card for DFS." He argued that a guaranty fund would only provide additional incentive for the DFS to drive rates down even further with the comfort of knowing that if a plan could not survive the low rates it would be bailed out by the safety net. (This criticism brought to mind the guaranty fund shield wielded by the DFS in its handling of the epic *Executive Life* failure – see sidebar*.)

The problem with the "get out of jail" argument, however, is that accountability and insolvency are two different issues even though they often overlap, and neither insureds nor health providers should

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be left unprotected because of concerns with the motives of regulators. Even in hindsight not all failures are predictable or caused by failures in the system, and it would be shortsighted to not pursue some form of guaranty fund or safety net system for future health plan failures. Further, if the rate approval and oversight issues raised and discussed during the forum were aggressively and collectively addressed, the incentive for a "get out of jail" card could disappear and the need for future calls on a safety net significantly reduced – but not eliminated!

Sensitive to adding additional costs on the health benefit system, Senator Seward in his closing remarks suggested that finding long-term solutions to the rate approval process could alleviate the need for adding new taxes or assessments on the industry, including for a guaranty fund. While fixing the existing process could minimize future calls upon a safety net, it should not be viewed as eliminating the need for protecting against unexpected failures, and the safety net topic should continue to be an important part of any ongoing dialogue.

It was pointed out during the round table discussion that Health Republic was a relatively small, regional health plan and simply fixing the aftermath of its failure without addressing longer term solutions would be short-sighted. It will be interesting to see if the Legislature follows through on this session, and whether it will be supported in its efforts by the administration.[IA]

Executive Life Insurance Company of New York, a solvent NY licensed company, was placed in rehabilitation by NY regulators in 1991 to "protect" it from claims against its insolvent parent. Within a year the receiver pushed through a plan resulting in selling off the company's best business with its best assets and left it with its most difficult annuity book of business backed by its most volatile assets. Two decades later, in 2012, Executive Life was liquidated with a $2 billion hole – all "achieved" under the auspices of the NY superintendent as protector-in-chief.

Even though this hole was less than half filled by life guaranty funds, the receiver successfully deflected criticism in part by the existence of this safety net for consumers. Never mind that the hole developed over two decades under the receiver's management; and never mind that almost a billion dollars of the shortfall was absorbed by Executive Life's most vulnerable annuitants – issues relating to the extent and scope of life guaranty fund coverage helped divert attention from the absence of any effort to hold those responsible for mismanaging the estate accountable.

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